(1)

Supreme Court, U.S.
FILED

No. 041098

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IN THE

SUPREME COURT OF THE UNITED STATES

EMERSON M.F., JOU, M.D.

PETITIONER

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,

RESPONDENT

On Petition For A Writ Of Certiorari
To The Supreme Court Of The State of Hawaii

PETITION FOR WRIT OF CERTIORARI

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EMERSON M.F., JOU, M.D.

QUESTION PRESENTED FOR REVIEW

I. Whether the state judiciary violated Petitioner's Constitutional rights to Due Process of law under the Fifth And Fourteenth Amendment, by refusing to allow him to present the damages element in a cause of action in tort?

II. Whether singling out a litigant whose damages in a common-law tort must be calculated with reference to workers compensation rules and statutes for treatment disparate from other litigants, violated the equal protection clause?

PARTES TO THE PROCEEDING

All parties appear in the caption of this case, on the cover page.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

PARTES TO THE PROCEEDING i

TABLE OF AUTHORITIES . . . . . iii-iv

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 1-2

STATEMENT OF THE CASE 2-5

ARGUMENT 6-11

A. The Petition Should Be Granted Because The State Courts Consistently Violate Rights To Due Process In Tort Cases Relating To Worker's Compensation 6-7

B. Actions By Hawaii State Courts Violated The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution 7-11

CONCLUSION 11

APPENDIX A - Hawaii Supreme Court Summary Disposition Order

APPENDIX B - Statutory Provisions Involved

TABLE OF AUTHORITIES

United States Constitution

First Amendment 11

Seventh Amendment 11

Fourteenth Amendment 6,7,11

CASES

Allstate Ins. v. Hague,
449 U.S. 302, 311, 101 S.Ct. 633 639 (1981) 6

Be&K Construction Co. v. NLRB,
536 U.S. 516, 525, 122 S.Ct. 2390, 2396 (2002) . . . 10-11

Bocalbos v. Kapiolani Med. Ctr.,
93 Haw. 116, 119 fn.12, 997 P.2d 42, 45
(App. 2000) 2

Brotherhood of Railroad Trainmen v. Virginia,
377 U.S. 1, 7, 94 S.Ct. 1113, 1117 (1964) 11

Brown v. Louisiana,
383 U.S. 131, 141, 86 S.Ct. 719, 723 (1966) 11

Brinkerhoff-Faris Trust & Sav. Co. v. Hill,
281 U.S. 673, 50 S.Ct. 451 (1930) 6, 7

Catron v. Tokio Marine Mgmt,
90 Haw. 407, 410, 978 P.2d 845, 848 (1999) 10

Christensen v. Younger,
47 Cal.App.3d 613, 618, 120 Cal.Rptr.923 (1975) . . . 8

City of Cleburne v. Cleburn Living Ctr.,
473 U.S. 432, 440, 105 S.Ct 3249 (1985) 10

Hough v. Pacific Insurance Co.,
83 Haw. 457, 927 P.2d 858 (1996) 9, 10

NAACP v. Button,
371 U.S. 415, 452, 83 S.Ct. 328, 348 (1963) 11

Romer v. Evans,
517 U.S. 620, 634-35, 116 S.Ct. 1620 (1996) 9

Schneiden v. Chavez-Munoz,
9 Neb.App.579, 586, 616 N.W.2d 46, 53
(App. 2000) 2

Village of Willowbrook v. Olech,
528 U.S. 562, 120 S.Ct. 1073 (2000) 9

UMW v. Coronado Coal Co.,
259 U.S. 344, 42 S.Ct. 570 (1922) 7

STATUTES AND RULES

United States Code Title 28
Section 1257(a). 1

Supreme Court Rule 10(b) 1

Hawaii Revised Statues
HRS §386-73 . . . . . .2, 6
HRS §663.1 . . . . . .2, 6, 7

OPINIONS BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the decisions below:

The Summary Disposition Order ("SDO") of the Hawaii Supreme Court, appears at the Appendix ("Appen.") of this Petition, and is unpublished.

JURISDICTION

The date on which the Supreme Court of The State of Hawaii affirmed the trial court was on November 12, 2004. Appen "A".

The jurisdiction of this Court is invoked under 28 §1257(a), or Rule 10(b) of the Supreme Court Rules.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment V [1791]

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, **nor be deprived of life, liberty, or property,**

without due process of law; nor shall private property be taken for public use, without just compensation.

[ARTICLE XIV. - 1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; **nor shall any Sate deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

Other Provisions Appended Hereto

A. Hawaii Revised Statutes, Sections §386-73, §663.1.

STATEMENT OF THE CASE

A. Parties:

Petitioner, Emerson M.F. Jou, M.D. is a physician in private practice in Honolulu, Hawaii. He is board-certified in physiatry. Schneiden v. Chavez-Munoz, 9 Neb.App.579, 586, 616 N.W.2d 46, 53 (App. 2000); Bocalbos v. Kapiolani Med. Ctr., 93 Haw. 116, 119 fn.12, 997 P.2d 42, 45 (App. 2000).

Respondent First Insurance Company of Hawaii Ltd., (FICOH) is an insurance company selling worker's compensation, automobile, and other property and casualty (P&C) insurance. In 2002, Hawaii P&C insurer's premiums, other than for life and annuity policies, totaled $1,796,690,502.00, while their claims benefits were only $708,842,399.00. Report of The Insurance Commissioner of Hawaii 2003 ("Cmr. Rpt") at 45. FICOH's 2002 Hawaii premiums were $72,328,085.00 against claims benefits paid of only $25,057,890.00. Id at 19.

The nearly 1.8 billion in premium charged by these insurers for insurance which includes health coverage overlaps with another $2.1 billion Hawaii residents paid to their HMOs and mutual benefit societies for health insurance. Id at 47. Added to this $3.9 billion burden on +1.2 million Hawaii residents, is another ±1.5 billion for life insurance and annuity premiums.

The effect of this money machine on the Hawaii Judiciary was noted to this court in a previous petition for certiorari, **S.C.U.S. No. 04-355.** Three out of nine individuals who approve selection and retention of state judges receive significant income from insurance companies. See **Jou v. First Insurance Com. Of Hawaii Ltd., S.Ct. No. 04-355,** Petition of Certiorari at pages 20-22.

B. Facts:

On or about August 27, 1998, Petitioner was denied credit by a lender (not a party to this suit). Op. Br. 1. The reason was that Respondent had maintained on record a judgment lien from a judgment against Petitioner, which had been paid.

At a jury trial for abuse of process and defamation the state court refused to allow Petitioner to present significant damages to the jury, because computation merely involved methods employed in worker's compensation cases. The state trial court decided these damages were thereby outside of its jurisdiction because they were precluded by the exclusivity bar of Hawaii's worker's compensation law. III RA (Record on Appeal, Hawaii Supreme Court) 267-268.

C. Federal Questions Preserved For Review

Federal questions were raised to the trial court before the case went to the jury, by motion in limine on the ground, inter alia that an earlier ruling excluding these damages (VIII RA 333) was in violation of Petitioner's "Federal and State constitutional rights to equal protection, due process, access to the courts; and, to petition for grievances." VIII RA 93. Petitioner added that the in limine orders "deprived Plaintiff of the equal protection of decisional authority, interpreting the Hawaii worker's comp. scheme. Workers in this State and their representatives fought long and hard for basic tort remedies for separate and additional injuries." VIII RA 96, 96. The trial court passed on this motion by denying it. VIII RA 208.

On appeal before the Hawaii Supreme Court, Petitioner again raised federal questions that, by misapplying the worker's compensation exclusivity bar, the trial court violated Petitioner's federally guaranteed

rights to equal protection, and due process of law. The opening brief stated, in salient part:

> "B. **Points OF Error On Which Appellant Intends To Rely**
>
> **1. Court Erroneously Applied Worker's Compensation Exclusivity Doctrine**
>
> The trial court refused, based upon erroneous application of the exclusivity bar, in Hawaii worker's compensation law, to permit Appellant to present the vast bulk of his damages case to the jury; and in so refusing, denied Dr. Jou equal protection, and due process of law, in violation of the State and Federal Constitution. This error is found in the "Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment Filed August 20, 2001". IXR 35-37.
>
> The Circuit Court mistakenly characterized FICOH's conduct as calculating worker's compensation medical payments; in fact, FICOH was deciding, at its leisure, how much of Dr. Jou's medical reimbursements to withhold from Dr. Jou, and instead apply to the satisfaction FICOH's Circuit Court money judgment. The erroneous actions by the Court helping the insurer were brought to its attention during oral argument on the MSJ. Nonetheless, the Court ruled (*Id* at VIIR 227, 278) . . ."

The Hawaii Supreme Court did not pass on the federal questions raised both in the trial court and in Petitioner's brief before it, on the merits. See Summary Disposition Order (SDO) dated 11-12-04. Appendix to Petition ("Appen").

ARGUMENT

A. The Petition Should Be Granted Because The State Courts Consistently Violate Rights To Due Process In Tort Cases Relating To Worker's Compensation

This case is similar to Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451 (1930).

In Hawaii, administrative agencies have no jurisdiction to decide common law torts of abuse of process or defamation. Compare these two sections of Hawaii Revised Statutes ("HRS"): §663.1 and §386-73. Appen. To prove damages in common law tort cases which relate, as here, to state worker's compensation claims, it is often necessary to make computations similar to those made in the worker's compensation agency. See SDO at 2 ¶2. Appen.

The state courts arbitrarily and unreasonably deprived Petitioner of his right to prove tort damages, which might have involved a private insurance company's calculations in a worker's compensation setting. Id. This conduct by the state courts violated the due process clause of the Fourteenth Amendment to the United States Constitution, in that these courts left Petitioner without a tort remedy, in a tort case tried to a jury. Allstate Ins. v. Hague, 449 U.S. 302, 311, 101 S.Ct. 633 639 (1981).

The jury at Bench found that Respondent First Insurance Company of Hawaii was liable to Petitioner Jou, for abuse of process but that the insurer did not legally cause any damages to Petitioner. SDO at 1. Appen. The jury found no liability on the defamation tort.

The in limine orders and refusal to admit evidence of the Respondent's calculations in the worker's comp. system misled the jury into finding no damages. The trial judge and the Hawaii Supreme Court violated their duties to avoid leaving injured parties without a remedy. "Law exists for society and the instincts of right and wrong must be given effect by the courts whenever reasonable interpretation of law and laws permit." UMW v. Coronado Coal Co., 259 U.S. 344, 42 S.Ct. 570 (1922).

In Brinkerhoff-faris Trust & Sav. Co. v. Hill, supra, 291 U.S. at 681-682, this Court struck down as a violation of due process a state court's decision denying an individual taxpayer any practicable opportunity to contest a tax on federal constitutional grounds.

Similarly, the Hawaii courts denied Petitioner the opportunity to prove tort damages, which involved an assertion that a worker's compensation insurer (Respondent) incorrectly calculated the amounts Petitioner, a worker's physician, should have been paid. SDO 2 at §2. At the time, these courts were fully aware that the worker's compensation agency, had no forum or jurisdiction to adjudicate the common law tort of abuse of process. HRS §663.1.

B. Actions By Hawaii State Courts Violated The Equal Protection Clause Of The Fourteenth Amendment To The United States Constitution

1. **Background**

The jury was led to believe by the trial court that it would determine the Petitioner's damages, by this instruction:

"The essential elements of a claim for abuse of process are:

1. An ulterior purpose,
2. A willful act in the use of a legal process not proper in the regular conduct of the proceeding, and
3. Damages.

If a judicial process was used for its intended purpose, then there is no abuse of process." *Id.*

XIRA 255, 269 (pg. 24); also Petitioner's Opening Brief (Op. Br.) below at 12; also BAJ1 No. 7.72 (7th Ed. 1986).

The jury was not permitted to decide the tort by the trial court's exclusion of damages it perceived were barred by the worker's compensation scheme. SDO 2 ¶2 (upheld) Appen. Moreover, the jury was kept from deciding the element of improper purpose, which like many abuse of process cases, involved the surrender of property, or the payment of money. Christensen v. Younger, 47 Cal.App.3d 613, 618, 120 Cal.Rptr.923 (1975).

2. State Court's Misconduct Does not Survive Rational Basis Review

Even if the statute upon which the Hawaii Supreme Court upheld the trial court's exclusion of damages contained terms expressly allowing the exclusion of evidence of damages, the state intentionally and

irrationally discriminated against other victims of the common law tort of abuse of process. Romer v. Evans, 517 U.S. 620, 634-35, 116 S.Ct. 1620 (1996).

None of the state courts articulated any rational basis for the difference in treatment between victims of abuse of process who must prove their damages by recourse to worker's compensation schedules versus those who do not. The statute referenced in the SDO is equally silent. Neither state court took the time to note that damages were but one element of a tort dispute, properly outside of Hawaii worker's compensation system.

The irrationality of the Hawaii Supreme Court's decision is also supported by the fact that it elected not to publish its decision, which remains at odds with published precedent by the same court. This clash indicates intemperate selectivity, or sheer animus toward Petitioner. Village of Willowbrook v. Olech, 528 U.S. 562, 120 S.Ct. 1073 (2000).

As early as 1996, the Hawaii Supreme Court had to reverse a trial court and make clear that Hawaii's exclusivity doctrine in its worker's compensation scheme did not bar separate claims against insurers for intentional torts in claims processing. Hough v. Pacific Insurance Co., 83 Haw. 457, 927 P.2d 858 (1996). Sadly, the trial court judgment in Hough was entered nearly four years before it was reversed (on March 25, 1992), and the injury to the worker took place on March 13, 1985 about eleven years before the Hawaii Supreme Court's decision. Id.

The case at Bench illustrates that Hawaii trial judges resisted, and refused to apply the principles underlying Hough.

In 1999, the Hawaii Supreme Court again had to apply the principles underlying Hough to a trial court decision which occurred prior to the Hough reversal. Catron v. Tokio Marine Mgmt, 90 Haw. 407, 410, 978 P.2d 845, 848 (1999).

While Petitioner was not a claimant, as were Hough and Catron, he sued Respondent insurer for intentional torts which were similarly separate and unrelated to the work injury. In fact, Petitioner's cause of action for abuse of process involved misuse of a judgment lien which had been paid. This judgment incidentally involved worker's compensation because Respondent asserted it applied worker's compensation medical fee schedules used to compute it. This was far more attenuated from the exclusivity doctrine, than Hough and Catron.

3. Impingement Of Fundamental Rights Requires Heightened Standard Of Review

The laws, and their application in this case are to be subjected to strict scrutiny, and will be sustained only if they are suitably tailored to serve a compelling state interest, in that the courts below impinged "on personal rights protected by the constitution." City of Cleburne v. Cleburn Living Ctr., 473 U.S. 432, 440, 105 S.Ct 3249 (1985).

As Hough and Catron clearly show, Hawaii trial judges repeatedly deny access of common law torts to the courts. Appellate delay compounds the problem. Conduct in these, and in the case at Bench, deprive and chill access to the courts, which is one aspect of the right to petition guaranteed by the First Amendment to the United States Constitution. Be&K Construction Co. v. NLRB, 536 U.S.

516, 525, 122 S.Ct. 2390, 2396 (2002). There must be a substantial regulatory purpose, not shown in this case at SDO (Appen), to justify depriving a litigant of his right to petition the courts when an element of proof relates to a worker's compensation computation. Brotherhood of Railroad Trainmen v. Virginia, 377 U.S. 1, 7, 94 S.Ct. 1113, 1117 (1964); NAACP v. Button, 371 U.S. 415, 452, 83 S.Ct. 328, 348 (1963).

This right of petition requires strict scrutiny under equal protection analysis. It is cast as guaranteed by both the 14th and 1st amendments. Brown v. Louisiana, 383 U.S. 131, 141, 86 S.Ct. 719, 723 (1966).

The second fundamental right impinged by the equal protection violation, was petitioner's right to a jury trial under the Seventh Amendment to the United States' Constitution. This included the right to try all elements of a case properly before the state courts, to a jury.

CONCLUSION

Petitioner requests that this petition be granted.

Dated: Honolulu, Hawaii, February 9, 2005.

Respectfully Submitted,

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*** NOT FOR PUBLICATION ***

NO. 25093

IN THE SUPREME COURT OF THE STATE OF HAWAI`I

EMERSON M.F. JOU, M.D., Plaintiff-Appellant,

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,
Defendant-Appellee,

And

JOHN DOE 1 to 10, DOE CORPORATION 1 to 10,
DOE PARTNERSHIP 1 to 10, and DOE ENTITY 1 to 10,
Defendants.

Appendix A

APPEAL FROM THE FIRST CIRCUIT COURT
(CIV. NO. 00-1-2490)

SUMMARY DISPOSITION ORDER
(By: Moon, C.J., Levinson, Nakayama, Acoba, and Duffy JJ.)

Plaintiff-Appellant Emerson M.F. Jou, M.D. appeals from the June 13, 2002 final judgment of the Circuit Court of the First Circuit[1] entering judgment in favor of Defendant-Appellee First Insurance Company of Hawaii, Ltd. (First Insurance). Dr. Jou filed a thirteen count complaint against First Insurance, but only two of these counts, abuse of process and defamation, were submitted to the jury. In a special verdict, the jury found that First Insurance was liable to Dr. Jou on the abuse of process claim, but that First Insurance did not legally cause any damages to Dr. Jou. The jury also found in favor of First Insurance on the defamation claim. On appeal, Dr. Jou argues that the circuit court erred by: (1) applying the worker's compensation "exclusivity doctrine"; (2) finding that Dr. Jou's claims for "other damages" were not in controversy; (3) instructing the jury that Dr. Jou was required to mitigate damages; (4) upholding the discovery master's sanctions; and (5) denying Dr. Jou's request for costs.

Upon carefully reviewing the record and briefs submitted, we hold as follows: (1) the circuit court did not err by concluding that it did not have jurisdiction to consider whether First Insurance correctly calculated the compensation due Dr. Jou for medical care he provided pursuant to Hawaii's workers' compensation law, Hawai`i Revised Statutes (HRS) chapter 386. The director of the Department of Labor and Industrial Relations (Director)

determines the charges and adopts the fee schedules governing compensation for medical care rendered employees incurring a work injury. HRS § 386-21(c) (Supp. 2003). The Director also has original jurisdiction over all disputes arising under HRS chapter 386. HRS § 386-73 (1993) ("[T]he director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under [chapter 386.]"); (2) this court will not consider Dr. Jou's arguments regarding "other damages" because he has not presented a reason for his argument or any authority supporting his argument. Hawai`i Rules of Appellate Procedure (HRAP) Rule 28(b)(7); (3) the circuit court did not err by instructing the jury that Dr. Jou had a duty to mitigate damages because this instruction is a proper statement of Hawai`i law. Tabieros v. Clark Equipment Co., 85 Hawai`i 336, 373, 944 P.2d 1279, 1316 (1997); (4) this court will not consider Dr. Jou's argument that the circuit court erred by denying Dr. Jou's request to strike the discovery master's sanction order because Dr. Jou failed to comply with HRAP Rule 28(b)(4); and (5) the circuit court did not abuse its discretion by denying Dr. Jou's request for costs because he was not the prevailing party. Therefore,

IT IS HEREBY ORDERED that the circuit court's final judgment filed June 13, 2002 is affirmed.

DATED: Honolulu, Hawai`i, November 12, 2004.

On the briefs:

Stephen M. Shaw
for plaintiff-appellant
Emerson M.F. Jou, M.D.

Dennis E.W. O'Connor,
Kelvin H. Kaneshiro,
and Jeffrey K. Hester
(of Reinwald, O'Connor
& Playdon LLP) for
defendant-appellee
First Insurance Company
of Hawaii, Ltd.

1. The Honorable Sabrina S. McKenna presided over this proceeding.

MICHIE'S HAWAII REVISED STATUTES ANNOTATED

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*** ANNOTATIONS CURRENT THROUGH AUGUST 27, 2004 ***

DIVISION 1 GOVERNMENT
TITLE 21 LABOR AND INDUSTRIAL RELATIONS
CHAPTER 386 WORKERS' COMPENSATION LAW
PART III ADMINISTRATION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

HRS @ 386-73 (2004)

HRS @ 386-73 LEXSTAT
FIRST OF 2 VERSIONS OF THIS SECTION

@ 386-73 Original jurisdiction over controversies.
[Effective until July 1, 2006]

Unless otherwise provided, the director of labor and industrial relations shall have original jurisdiction over all controversies and disputes arising under this chapter. The decisions of the director shall be enforceable by the circuit court as provided in section 386-91. There shall be a right of appeal from the decisions of the director to the

appellate board and thence to the supreme court subject to chapter 602 as provided in sections 386-87 and 386-88, but in no case shall an appeal operate as a supersede as or stay unless the appellate board or the supreme court so orders.

HISTORY: L 1963, c 116, pt of @ 1; Supp, @ 97-72; HRS @ 386-73; am L 1969, c 244, @ 2b; am L 1979, c 111, @ 18

NOTES:
CROSS REFERENCES -- As to stay, see HRCP, Rule 72(i).

CIRCUIT COURT IS RELEGATED TO SECONDARY ROLE -- This section precludes original court action to settle controversies involving the workers' compensation law.

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DIVISION 4 COURTS AND JUDICIAL PROCEEDINGS
TITLE 36 CIVIL REMEDIES AND DEFENSES AND SPECIAL PROCEEDINGS
CHAPTER 663 TORT ACTIONS
PART I LIABILITY; SURVIVAL OF ACTIONS

<=1> GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

HRS @ 663-1 (2004)

HRS @ 663-1

@ 663-1 Torts, who may sue and for what

Except as otherwise provided, all persons residing or being in the State shall be personally responsible in damages, for trespass or injury, whether direct or consequential, to the person or property of others, or to their spouses or reciprocal beneficiaries, children under majority, or wards, by such offending party, or the offending party's child under majority, or by the offending party's command, or by the offending party's animals, domestic or wild; and the party aggrieved may prosecute therefor in the proper courts.

HISTORY: CC 1859, @ 1125; RL 1925, @ 2365; RL 1935, @ 4049; RL 1945, @ 10485; RL 1955, @ 246-1; HRS @ 663-1; am L 1972, c 144, @ 2(a) and c 189, @ 1; am imp L 1984, c 90, @ 1; am L 1997, c 383, @ 65

NOTES:
CROSS REFERENCES -- As to guardian ad litem, see @ 551-2 and HRCP, Rule 17(c);
DCRCP, Rule 17(c). As to affirmative offenses, see HRCP, Rule 8(c); DCRCP, Rule
8(b) and (c).

I General Consideration
II Bailment
III Damages

No. 04-1098

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IN THE SUPREME COURT OF THE UNITED STATES

EMERSON M.F. JOU, M.D.

PETITIONER

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD.,

RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF HAWAII

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the trial court and the Hawaii Supreme Court deprived DR. JOU of his 14th Amendment right to due process when they denied DR. JOU the opportunity to present damages involving calculations pursuant to Hawaii's workers' compensation laws, despite summary adjudication of such damages?

II. Whether the trial court and the Hawaii Supreme Court treated DR. JOU differently than other tort litigants when they precluded DR. JOU from presenting damages involving workers' compensation calculations, despite the fact that original jurisdiction over Hawaii's workers' compensation controversies rests with the State of Hawaii, Department of Labor and Industrial Relations?

TABLE OF CONTENTS

OPINIONS BELOW 1

BASIS OF JURISDICTION 1

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED 1

SUMMARY OF REASONS FOR DENYING THE PETITION 6

ARGUMENT 6

I. THERE IS NO JURISDICTION FOR THIS COURT TO REVIEW DECISIONS ISSUED BY HAWAII COURTS BELOW 6

II. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI FOR QUESTIONS OF STATE LAW 9

III. DR. JOU'S CLAIMS HAVE NO MERIT 10

A. There Is No Due Process Right to Present Evidence on Damages Because Dr. Jou Was Afforded A Real Opportunity to Protect His Underlying Claims and Related Damages From Summary Judgment 10

B. Dr. Jou Was Treated Like Other Similarly Situated Tort Claimants Seeking to Litigate Damages Encompassed By Hawaii's Workers' Compensation Statutes 12

1. There is no First Amendment right to petition for the redress of damages ostensibly caused by a non-governmental party 12

2. There is no Seventh Amendment right to a jury trial on damages where the underlying causes of actions have been summarily dismissed 13

3. The Hawaii courts did not disparately apply Hawaii 's workers' compensation statutes..... 14

CONCLUSION 17

APPENDIX A - Final Judgment, State of Hawaii, Circuit Court of the First Circuit, filed June 13, 2002

APPENDIX B - Order Granting In Part and Denying In Part Defendant's Motion for Summary Judgment Filed August 20, 2001, State of Hawaii, Circuit Court of the First Circuit, filed November 14, 2001

APPENDIX C - Order Re Motions In Limine, State of Hawaii, Circuit Court of the First Circuit, filed October 29, 2001

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BE & K Construction Co. v. NLRB, 536 U.S. 516, 122 S.Ct. 2390, 153 L.Ed.2d 499 (2002) 12

Brinkerhoff Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930) 10, 11

California v. Holladay, 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1985). 2

Catron v. Tokio Marine Management, Inc., 90 Haw. 407, 978 P.2d 845 (Haw. 1999) 14

Ex Parte Peterson, 253 U.S. 300, 40 S. Ct. 543, 546 64 L. Ed. 919 (1920) 13

Fidelity & Deposit Co. v. United States, 187 U.S. 315, 23 S. Ct. 120, 47 L. Ed. 194 (1902) 13

First National Bank v. Estherville, 215 U.S. 34, 30 S.Ct. 1521, 54 L.Ed. 223 (1910) 2, 7, 8

Hodel v. Indiana, 452 U.S. 314, 101 S. Ct. 2376, 69 L. Ed. 2d 40 (1981) 14

Hough v. Pacific Insurance Co., 83 Haw. 457, 927 P.2d 858 (Haw. 1996) 14, 15, 16, 17

Johnson v. California, __ U.S. __, 124 S.Ct. 1833, 158 L. Ed. 2d 696 (2004) 7

Lamb Enterprises, Inc. v. Kiroff, 399 F.Supp. 409 (N.D. Ohio 1975) 8

Maher v. Roe, 432 U.S. 464, 97 S. Ct. 2376, 53 L. Ed. 2d 484 (1977) 14

Meyer v. Grant, 486 U.S. 414, 108 S. Ct. 1886, 100 L. Ed. 2d 425 (1988) 12

New Orleans Waterworks Co. v. Louisiana, 185 U.S. 336, 22 S.Ct. 691, 46 L.Ed. 936 (1902) 1

Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979) 13

Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). 8

Reich v. Freeport, 388 F.Supp. 953 (N.D. Ill. 1974) 7

Thomas v. American Home Prods., 519 U.S. 913, 117 S.Ct. 282, 136 L. Ed. 2d 201 (1996) 1

United States v. Cruikshank, 92 U.S. 542, 23 L.Ed. 588 (1876) 12

Williams v. Vermont, 472 U.S. 14, 105 S. Ct. 2465, 86 L. Ed. 2d 11 (1985) 14

Wilson v. Cook, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946) 7

STATUTES

28 U.S.C. 1257 ..... 7, 8

HRS § 386-73 ..... 14, 15, 17

RULES

United States Supreme Court Rules, Rule 10 ..... 1, 10

OPINIONS BELOW

Respondent FIRST INSURANCE COMPANY OF HAWAII, LTD. ("FICOH") incorporates herein by reference, the opinions and orders cited by Petitioner EMERSON M.F., JOU, M.D. ("DR. JOU" and/or "Petitioner"). *See* the Summary Disposition Order issued by the Hawaii Supreme Court, attached to Petitioner's Petition for Writ of Certiorari as Appendix A. Additionally relevant to this matter are (1) the Final Judgment of the State of Hawaii, Circuit Court of the First Circuit ("Circuit Court") filed June 13, 2002, (2) the Order Granting In Part and Denying In Part Defendant's Motion For Summary Judgment Filed August 20, 2001, of the Circuit Court filed November 14, 2001, and (3) the Order Re Motions In Limine of the Circuit Court filed October 29, 2001. *See* Appendices A, B and C.

BASIS OF JURISDICTION

There is no basis for jurisdiction in this Court. Petitioner has not met requirements necessary to invoke jurisdiction under 28 U.S.C. 1257. Further, Rule 10(b) of the Supreme Court Rules ("SCR") does not grant jurisdiction to this Court, but merely *indicates* the general character of reasons for which the Supreme Court will grant plenary consideration. *Thomas v. American Home Prods.*, 519 U.S. 913, 117 S.Ct. 282, 283, 136 L. Ed. 2d 201 (1996)(emphasis added).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

There are no Constitutional and/or Federal provisions properly before this Court because Petitioner raises no Federal questions with merit or substance. *New Orleans Waterworks Co. v. Louisiana,* 185 U.S. 336, 22 S.Ct. 691, 46 L.Ed. 936 (1902). Issues raised by Petitioner were not passed

upon Federal grounds, but were resolved based upon well-established state law. *First National Bank v. Estherville*, 215 U.S. 341, 30 S.Ct. 1521, 54 L.Ed. 223 (1910); *California v. Holladay*, 159 U.S. 415, 16 S.Ct. 53, 40 L.Ed. 202 (1985).

CONCISE STATEMENT OF THE CASE

This case arises from decisions in a Workers' Compensation proceeding in the Disability Compensation Division of the State of Hawaii, Department of Labor and Industrial Relations ("DLIR"), upon which FICOH obtained a Judgment against Petitioner in the First Circuit Court of the State of Hawaii in S.P. 95-0313. Upon obtaining the Judgment, counsel for FICOH began executing upon the Judgment and, at each step, filed partial satisfactions of judgment.

In June, 1998, after FICOH had obtained the face value of the Judgment, FICOH's counsel wrote to DR. JOU's counsel in an attempt to negotiate a final resolution of S.P. 95-0313 as well as the underlying DLIR proceeding.[1] FICOH's counsel proposed to have FICOH waive all claims to fees and costs incurred in the executions on the Judgment as well as accrued interest in return for DR. JOU's dismissal of his appeal in the DLIR proceeding. DR. JOU's counsel, however, did not respond.

Sometime in August, 1998, DR. JOU applied to First Hawaiian Bank for an equity line of credit. Although his application was approved, the bank did not provide the line of credit because of the Judgment in S.P. 95-0313.

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[1] DR. JOU appealed the decisions in DLIR proceeding, first to the Labor and Industrial Relations Appeals Board, then to the Hawaii Supreme Court in 2001, and finally to this Court in 2004. *See Jou v. First Insurance Co. of Hawaii, Ltd.*, Supreme Court No. 04-355.

Eventually, in February, 1999, a Satisfaction of Judgment and Release of Judgment Lien was filed.

On August, 15, 2000, DR. JOU filed his Complaint in the Circuit Court of the First Circuit, State of Hawaii, alleging thirteen causes of action. (Record on Appeal ["RA"] Vol. 1 at 1-22).

On February 7, 2001, DR. JOU filed a Motion For Summary Judgment. (RA Vol. 1 at 199-214). On March 7, 2001, FICOH filed a Cross-Motion For Summary Judgment. (RA Vol. 2 at 1-60). On April 11, 2001, the Order Granting In Part And Denying In Part Defendant's Cross-Motion For Summary Judgment was filed which granted summary judgment as to DR. JOU's Third, Sixth, Seventh, Tenth and Twelfth Causes of Action. (RA Vol. 2 at 114-115). On the following day, the order denying DR. JOU's Motion For Summary Judgment was filed. (RA Vol. 2 at 116-117).

On August 20, 2001, FICOH filed its Motion For Summary Judgment. (RA Vol. 3 at 156-209). That motion was initially heard on September 10, 2001 with a further hearing on September 24, 2001. (RA Vol. 9 at 35). The trial court granted FICOH's Motion as to DR. JOU's Cause of Action for Accounting, and as to all claims for damages, except for damages relating to injury of credit and reputation, and attorneys' fees and costs in the trial court matter. (RA Vol. 9 at 35-37). The trial court also ruled that DR. JOU's expert on damages was stricken, that DR. JOU himself was stricken as an expert witness (with respect to damages and otherwise), and that DR. JOU did not state a claim for libel per se. (RA Vol. 9 at 35-37).

On September 28, 2001, FICOH filed a Motion In Limine to Preclude Any Evidence of Financial Damages. (RA Vol. 5 at 115-136). FICOH argued that because the trial court ruled DR. JOU could not testify on his own behalf regarding

interest and real estate matters, and because DR. JOU failed to timely identify an expert witness, DR. JOU had no witness who could competently testify as to his alleged financial damages. FICOH further argued that since the trial court granted summary judgment as to all of Plaintiffs claims for damages (except for damages relating to injury of credit, and attorneys' fees and costs in the trial court matter), DR. JOU should be precluded from presenting any evidence of financial damages. FICOH also filed a Motion In Limine to Preclude Plaintiff From Challenging the Amounts Garnished. (RA Vol. 5 at 136-141). This Motion In Limine was advanced on the positions that (1) Plaintiff initially sought an accounting to calculate amounts FICOH garnished from Plaintiff's workers' compensation claims, (2) the trial court's grant of summary judgment as to the Accounting therefore obviated the admissibility of any evidence bearing on amounts garnished, and (3) original jurisdiction over Hawaii's workers' compensation controversies rests with the DLIR and not Hawaii's circuit courts. On September 28, 2001, DR. JOU filed a Motion In Limine for Reconsideration of Ruling on Evidence Regarding Workers Compensation, reasserting that damages involving workers' compensation calculations were not barred. (RA Vol. 6 at 32-37; RA Vol. 4 at 32-37). The trial court granted FICOH's Motion In Limines and denied DR. JOU's Motion In Limine. (RA Vol. 8 at 207-210).

During trial on the week of April 1, 2002, DR. JOU dismissed his Second, Fourth, Eighth, Ninth and Eleventh Causes of Action and FICOH dismissed its Counterclaim. (RA Vol. 14 at 32-33). Only the two remaining causes of action were submitted to the jury: abuse of process and libel or defamation. *See* Special Verdict, RA Vol. 11 at 180-182.

The jury returned its Special Verdict on April 11, 2002 finding against DR. JOU on his defamation claim. The jury, however, found that FICOH had committed an abuse of process but that such conduct did not legally cause any

damages to DR. JOU. (RA Vol. 11 at 180-182). DR. JOU filed a Notice of Taxation of Costs on April 22, 2002. (RA Vol. 13 at 275-279). FICOH filed an objection to the Notice on April 23, 2002. (RA Vol. 13 at 280-294).

FICOH filed its Motion For Taxation of Costs on May 2, 2002. (RA Vol. 14 at 1-21). Both FICOH's Motion For Taxation of Costs and DR. JOU's Notice of Taxation of Costs were heard by the trial court on May 20, 2002. (RA Vol. 14 at 98-101). The trial court denied DR. JOU's Notice of Taxation of Costs in its entirety (RA Vol. 14 at 98-99) and granted in part and denied in part FICOH's Motion For Taxation of Costs. (RA Vol. 14 at 100-101).

The Final Judgment was filed on June 13, 2002. At no time did the trial court decide any Federal issue, or address the issues of equal protection and due process. In effect, the trial court did not pass upon a Federal question. (RA Vols. 1-14).

DR. JOU filed his Notice of Appeal to the Hawaii Supreme Court on June 26, 2002. (RA Vol. 14 at 105-110). In his Opening Brief filed September 20, 2002 ("OB"), DR. JOU briefly remarked that "[in refusing to permit Petitioner to present the bulk of his damages to the jury, the trial court] denied Dr. Jou of equal protection and due process of law." (OB at p. 2). No further arguments or authorities were raised with respect to alleged Constitutional infringements. On November 12, 2004, the Hawaii Supreme Court issued its Summary Disposition Order ("SDO"), omitting any reference to DR. JOU's mention of due process and equal protection rights. (*See* SDO generally).

DR. JOU now seeks review of claims for the 14th Amendment right to due process and the 14th Amendment right to equal protection. DR. JOU asks this Court to find the following:

1. The trial court and the Hawaii Supreme Court deprived DR. JOU of his 14th Amendment right to due process when they denied DR. JOU the opportunity to present damages involving calculations pursuant to Hawaii's workers' compensation laws, despite summary adjudication of the same.

2. The trial court and the Hawaii Supreme Court treated DR. JOU differently than other tort litigants, when they precluded DR. JOU from presenting damages involving workers' compensation calculations, despite the fact that original jurisdiction over Hawaii's workers' compensation controversies rests with the DLIR.

SUMMARY OF REASONS FOR DENYING THE PETITION

This Court has no jurisdiction to review decisions of the Hawaii courts below because DR. JOU fails to meet the jurisdictional requirements of 28 U.S.C. 1257(a). DR. JOU did not properly raise Federal or Constitutional issues below, nor did the Hawaii courts pass upon any Federal or Constitutional questions. Even assuming DR. JOU met the jurisdictional requirements, there is no compelling reason for the court to grant review as the Hawaii courts did not decided any question of Federal law. Finally, DR. JOU's claims are substantively devoid of merit.

ARGUMENT

I. THERE IS NO JURISDICTION FOR THIS COURT TO REVIEW DECISIONS ISSUED BY HAWAII COURTS BELOW

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may

> be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. 1257(a) (emphasis added). Federal courts are courts of limited jurisdiction empowered to hear only those cases which have been entrusted to them by Congressional grant of jurisdiction, and they have no power to review judgment of state courts, except where a substantial Federal question is involved. *Reich v. Freeport*, 388 F.Supp. 953 (N.D. Ill. 1974), *aff'd on other grounds,* 527 F.2d 666 (7th Cir. 1975). Under 28 U.S.C. 1257, jurisdiction is further limited to review of final judgments or decrees rendered by the highest court of a State in which a decision could be had. *Johnson v. California*, __ U.S. __, 124 S.Ct. 1833, 1834, 158 L. Ed. 2d 696 (2004).

For the Supreme Court to review a decision of a state court, it must appear affirmatively from record not only that a Federal or Constitutional question was presented to highest court of state having jurisdiction, but that its decision of the Federal or Constitutional question was necessary for determination of case. *Wilson v. Cook*, 327 U.S. 474, 66 S.Ct. 663, 90 L.Ed. 793 (1946). It is not enough for the record to show that a Federal question was argued or presented to that court for decision. *First National Bank v. Estherville,* 215 U.S. 341, 54 L.Ed. 223, 30 S.Ct. 152 (1910). It must appear that decision of the Federal or Constitutional question was necessary to the determination of cause and that

it was actually decided, or that judgment, as rendered, could not have been given without deciding it. *Id.*

Accordingly, the Supreme Court has no jurisdiction to review a state decision resting on adequate and independent non-Federal grounds. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 65 S.Ct. 1475, 89 L.Ed. 2092 (1945). The decision will not be reviewed even though the state court may have also summoned to its support erroneous views of Federal law. *Id.* Where a decision might have been rendered on either Federal ground or state ground, the Supreme Court will not review the Federal ground on appeal as of right under 28 U.S.C. § 1257 unless the state ground is too insubstantial or insufficient to justify the result below. *Lamb Enterprises, Inc. v. Kiroff*, 399 F.Supp. 409 (N.D. Ohio 1975), *rev'd on other grounds* 549 F.2d 1052 (6th Cir. 1977), *cert. denied* 431 U.S. 968, 97 S.Ct. 2926, 53 L.Ed. 2d 1064 (1977). When the highest state court fails to pass upon a Federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Board of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537, 550, 107 S.Ct. 1940, 1948, 95 L. Ed. 2d 474, 487 (1987).

As DR. JOU noted in his Petition at page 5, "the Hawaii Supreme Court did not pass on the Federal questions raised both in the trial court and in Petitioner's brief before it, on the merits." (SDO, p. 1-3). The Hawaii Supreme Court also did not render a decision as to DR. JOU's equal protection and due process claims because DR. JOU's points on appeal were decided pursuant to well-settled state statutory and case law as well as established court rules. (SDO, p. 2). Similarly, the trial court's decision was void of any reference to Federal or Constitutional claims. Thus, the Supreme Court is without jurisdiction to review the trial court

and Hawaii Supreme Court judgments, and DR. JOU's writ of certiorari should be dismissed.

II. THERE IS NO COMPELLING REASON TO GRANT A WRIT OF CERTIORARI FOR QUESTIONS OF STATE LAW

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important Federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important Federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of Federal law that has not been, but should be, settled by this Court, or has decided an important Federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

SCR Rule 10 (emphasis added). Guided by SCR Rule 10, it is clear that the issues raised by DR. JOU's Petition for Writ of Certiorari are not of the character necessary for review by the United States Supreme Court.

The trial court and Hawaii Supreme Court did not decide any question of Federal law. Rather, all issues addressed were resolved based on well-established Hawaii State law. Furthermore, DR. JOU does not challenge the constitutionality of Hawaii's laws, but asserts only that such laws were erroneously applied. Thus, DR. JOU's Petition fails to meet the requirements of SCR Rule 10.

III. DR. JOU'S CLAIMS HAVE NO MERIT

Examining DR. JOU's individual contentions, there is no basis in law or fact for a ruling in his favor. Substantively, DR. JOU's claims have no merit.

A. There Is No Due Process Right to Present Evidence on Damages Because Dr. Jou Was Afforded A Real Opportunity to Protect His Underlying Claims and Related Damages From Summary Judgment

DR. JOU argues that a 14th Amendment due process violation occurred when he was prevented from presenting damages involving calculations pursuant to Hawaii's workers' compensation laws. In support of this contention, DR. JOU cites to *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 101 S.Ct. 633, 66 L.Ed.2d 521 (1981) and *Brinkerhoff Trust & Savings Co. v. Hill,* 281 U.S. 673, 50 S.Ct. 451, 74 L.Ed. 1107 (1930), for the proposition that due process provides one with the opportunity to present his case and to be heard in his support. *Allstate Ins. Co.,* 449 U.S. at 311, 101 S.Ct. at

639, 66 L.Ed.2d at 530; *Brinkerhoff Trust & Savings Co.*, 281 U.S. at 681, 50 S.Ct. at 454, 74 L.Ed. at 1114.

The standard for determining whether a state has afforded due process of the law was enumerated in *Brinkerhoff Trust & Savings Co.* as follows: "A State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff Trust & Savings Co.*, 281 U.S. at 681, 50 S.Ct. at 454, 74 L.Ed. at 1114.

In this case, DR. JOU was afforded real and ample opportunities to protect his presentation of damages involving workers' compensation calculations. DR. JOU could have presented and adjudicated claims for the computation of damages pursuant to Hawaii's workers' compensation statutes in the DLIR administrative proceedings.

DR. JOU was also afforded the opportunity to present his other claims for damages to the jury, had he timely designated an expert witness and properly provided relevant evidence to support such claims. DR. JOU however, failed to meet his burden of proof. (RA Vol. 9 at 35-37).

DR. JOU was provided with ample opportunity under state procedural rules, to protect his presentation of damages. Having failed to take advantage of the opportunity, DR. JOU cannot now claim a deprivation of due process.

B. Dr. Jou Was Treated Like Other Similarly Situated Tort Claimants Seeking to Litigate Damages Encompassed By Hawaii's Workers' Compensation Statutes

DR. JOU argues that the courts below violated his right to equal protection when they prohibited him from presenting evidence of damages involving calculations pursuant to Hawaii workers' compensation statutes, while allowing other claimants to pursue tort actions for bad faith processing of workers' compensation benefits. DR. JOU further argues that because the Hawaii courts have infringed upon his fundamental right to a trial by jury and to petition the government for redress of grievances, the strict scrutiny standard should apply to his equal protection claim. DR. JOU is wrong in both instances.

1. There is no First Amendment right to petition for the redress of damages ostensibly caused by a non-governmental party

"The First Amendment provides, in relevant part, Congress shall make no law abridging the right of the people to petition the Government for a redress of grievances." *BE & K Construction Co. v. NLRB,* 536 U.S. 516, 524, 122 S.Ct. 2390, 2395-2396, 153 L.Ed.2d 499, 510 (2002).[2] In 1876, the Supreme Court limited the right to petition to grievances connected with the powers or duties of the government. *United States v. Cruikshank,* 92 U.S. 542, 552, 23 L.Ed. 588, 591 (1876).

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[2] The Fourteenth Amendment makes this prohibition applicable to the State of Hawaii. *Meyer v. Grant,* 486 U.S. 414, 420, 108 S. Ct. 1886, 1891, 100 L. Ed. 2d 425, 434 (1988).

In this case, DR. JOU's claims do not fall within the scope of First Amendment protections. None of the allegations contained in DR. JOU's Complaint relate to the powers or duties of the government. (RA Vol. 1 at 1-22). Instead, DR. JOU's causes of action at the trial court level related entirely to the alleged acts or omissions of FICOH, a private non-governmental party. *Id.* Accordingly, the right to petition the government for redress is not implicated in this matter.

2. There is no Seventh Amendment right to a jury trial on damages where the underlying causes of actions have been summarily dismissed

"No one is entitled in a civil case to trial by jury unless and except so far as there are issues of fact to be determined. It does not infringe the constitutional right to a trial by jury, to require, with a view to formulating the issues, an oath by each party to the facts relied upon." *Ex Parte Peterson*, 253 U.S. 300, 310, 40 S. Ct. 543, 546, 64 L. Ed. 919, 924 (1920). Simply stated, "summary judgment does not violate the Seventh Amendment." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 336, 99 S.Ct. 645, 654, 58 L.Ed.2d 552, 565 (1979)(citing *Fidelity & Deposit Co. v. United States*, 187 U.S. 315, 319-321, 23 S. Ct. 120, 121-122, 47 L. Ed. 194, 197-198 (1902)).

In the instant case, DR. JOU failed to show that genuine issues of fact existed as to damages associated with Hawaii's workers' compensation scheme. (RA Vol. 9 at 35-37). In view of the trial court's ruling on summary judgment against DR. JOU, the trial court did not violate DR. JOU's Seventh Amendment right when it subsequently granted FICOH's Motions In Limine. (RA Vol. 8 at 207-210). Hence, DR. JOU fails to present any violation of his fundamental rights by the trial court or the Hawaii Supreme Court.

3. The Hawaii courts did not disparately apply Hawaii 's workers' compensation statutes

The test of rationality applies in the absence of a suspect classification or the infringement of a fundamental right. *Maher v. Roe,* 432 U.S. 464, 478, 97 S. Ct. 2376, 2385, 53 L. Ed. 2d 484, 497 (1977). Accordingly, claims of disparate treatment that do not employ suspect classifications or infringe upon fundamental rights, must be upheld against equal protection attacks when such "treatment" is rationally related to a legitimate governmental purpose. *Hodel v. Indiana*, 452 U.S. 314, 331, 101 S. Ct. 2376, 2387, 69 L. Ed. 2d 40, 55 (1981).

Applying the rational basis test to DR. JOU's equal protection claim, the Hawaii courts' actions will be sustained if related to a legitimate government purpose. However, we do not reach the occasion to identify the Hawaii courts' interest in applying a differential treatment, because DR. JOU suffers no unequal treatment of the law. *Williams v. Vermont,* 472 U.S. 14, 20, 105 S. Ct. 2465, 2470, 86 L. Ed. 2d 11, 19 (1985). Upon a closer reading of the authorities cited by DR. JOU, *Hough v. Pacific Insurance Co.*, 83 Haw. 457, 927 P.2d 858 (Haw. 1996) and *Catron v. Tokio Marine Management, Inc.*, 90 Haw. 407, 978 P.2d 845 (Haw. 1999), it becomes evident that the Hawaii courts equitably applied Hawaii Revised Statute ("HRS") § 386-73 to the facts of his case.

HRS § 386-73 provides that the State of Hawaii, Director of Labor and Industrial Relations, shall have original jurisdiction over all controversies and disputes arising under Hawaii's workers' compensation statutes at HRS, Chapter 386. *See* HRS § 386-73. As DR. JOU correctly states, *Hough* and *Catron* stand for the proposition that where common law tort claims do not arise under HRS, Chapter

386, such tort claims are not subject to the original jurisdiction provision of HRS § 386-73. In effect, relief for common law torts may properly be sought in Hawaii's circuit courts, not withstanding other jurisdictional restrictions. However, unlike the claimants in *Hough* and *Catron* who pursued tort actions arising out of the bad faith processing of workers' compensation benefits, DR. JOU sought to litigate in the trial court the calculation of a medical provider's reimbursement for treatment of work injuries under Hawaii's workers' compensation fee schedule.

In *Hough*, plaintiff made a claim for workers' compensation benefits. Defendant, the employer's workers' compensation carrier, initially paid plaintiff's benefits, but then terminated them. Plaintiff filed a complaint with the Director of the DLIR. The director issued an order for damages pursuant to Hawaii's workers' compensation scheme. Plaintiff then filed a claim in the circuit court for defendant's bad faith conduct in processing his workers' compensation claim, as well as violations of HRS, Chapter 386. The court in *Hough* held that plaintiff's claims relating to injuries arising out of his attempt to obtain workers' compensation benefits, were not in the original jurisdiction of the Director of the DLIR. *Hough,* 83 Haw. at 466, 927 P.2d at 867. At the same time, it was specifically enumerated that disputes arising under HRS, Chapter 386, remained in the original jurisdiction of the Director of the DLIR. *Id.*

In *Catron,* the plaintiff also filed a claim for workers' compensation benefits. Plaintiff and defendant insurance carrier reached a settlement, which was later approved by the Director of the DLIR. Subsequent to the settlement, defendant delayed payments due under the settlement agreement, and made harassing phone calls to plaintiff. Plaintiff filed suit in the circuit court for breach of contract and bad faith handling of his workers' compensation claim. However, Plaintiff did not attempt to enforce the settlement

agreement or obtain payment of damages attributable the work related injury. *Catron*, 90 Haw. at 411, 978 P.2d at 849. Applying the holding in *Hough*, the court in *Catron* ruled that plaintiff's claims for tortious conduct were not within the original jurisdiction of the Director of the DLIR. *Id.*

DR. JOU's claims are distinguishable from the decisions set forth in *Hough* and *Catron* because the circuit courts therein did not confront the payment of compensation for work related injuries itself, or the enforcement of DLIR orders and settlements. Plaintiffs in *Hough* and *Catron* sought "reparations for damages outside of the scope of payment of workers' compensation benefits." *Catron*, 90 Haw. at 411, 978 P.2d at 849. DR. JOU on the other hand, sought to litigate in the state court the payment and calculation of medical reimbursements directly attributable to workers' compensation benefits, which is clearly within the original jurisdiction of the DLIR.

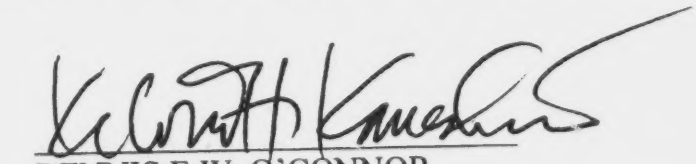
More appropriate to the facts of our case is the decision in *Amantiad v. Odum*, 90 Haw. 152, 977 P.2d 160 (Haw. 1999). In *Amantiad*, a plaintiff employee filed a third party tort action. The employer then intervened to protect its interest in reimbursement of workers' compensation benefits paid to plaintiff. The parties entered a settlement agreement, which settled employee's claims against the third party tort defendant, and any claims for future workers' compensation benefits. By stipulation of the parties, the case was dismissed with prejudice. Plaintiff later refused to execute the settlement agreement and the employer filed a motion to enforce the settlement agreement. Because there was a dispute over payments of workers' compensation benefits itself, the appellate court held that the circuit court lacked jurisdiction to enforce the settlement agreement. *Amantiad*, 90 Haw. at 167, 977 P.2d at 175.

Like the court in *Amantiad*, the trial and appellate courts in this case determined that HRS § 386-73 denied the trial court of jurisdiction to determine damages within the scope of Hawaii workers' compensation statutes, HRS, Chapter 386. Although the result here is different than that of *Hough* and *Catron,* the application of HRS § 386-73 here is the same; HRS § 386-73 is applied to restrain the jurisdiction of Hawaii's circuit courts for claims arising under HRS, Chapter 386. There was no different or inequitable application of the law in DR. JOU's case. The law was properly applied and the result was appropriate.

DR. JOU has failed to make an adequate showing that he suffered any unequal treatment of the law. DR. JOU has not even suggested that other tort claimants were allowed to litigate at the circuit court level, medical reimbursements attributable to work related injuries. There is no law or evidence to support DR. JOU's equal protection claim.

CONCLUSION

For the foregoing reasons, Respondent FIRST INSURANCE COMPANY OF HAWAII, LTD. respectfully requests that DR. JOU's Petition for Writ of Certiorari be denied.



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IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D.,

Plaintiff,

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD., JOHN DOE 1 TO 10, DOE CORPORATION 1 TO 10, DOE PARTNERSHIP 1 TO 10, and DOE ENTITY 1 TO 10,

Defendants.

CIVIL NO. 00-1-2490-08
(Other Civil Action)

FINAL JUDGMENT

JUDGE: SABRINA S. McKENNA
TRIAL DATE: APRIL 1, 2002

APPENDIX A

FINAL JUDGMENT

This action having come on for trial before the Court and a jury, the Honorable Sabrina S. McKenna presiding, and the jury having duly rendered its Special Verdict on April 11, 2002 in favor of Defendant FIRST INSURANCE COMPANY OF HAWAII, LTD. and against Plaintiff,

IT IS HEREBY ADJUDGED, ORDERED AND DECREED that pursuant to

1. the Order Granting In Part And Denying In Part Defendant's Cross-Motion For Summary Judgment filed on April 11, 2001(granting summary judgment as to Plaintiff's Third, Sixth, Seventh, Tenth and Twelfth Causes of Action);

2. the Order Granting In Part And Denying In Part Defendant's Motion For Summary Judgment Filed August 20, 2001 filed on November 14, 2001 (granting summary judgment as to Plaintiff's Thirteenth Cause of Action);

3. the Order Dismissing Certain Causes of Action And/Or Claims With Prejudice filed on May 9, 2002 (dismissing Plaintiff's Second, Fourth, Eighth, Ninth and Eleventh Causes of Action and Defendant's Counterclaim); and

4. the Special Verdict filed on April 11, 2002 (finding in favor of Defendant and against Plaintiff on Plaintiff's First and Fifth Causes of Action),

judgment is entered in favor of Defendant FIRST INSURANCE COMPANY OF HAWAII, LTD. and that Plaintiff takes nothing against said Defendant.

IT IS FURTHER ADJUDGED, ORDERED AND DECREED that, pursuant to the Order Granting In Part And Denying In Part Defendant's Motion For Taxation of Costs which was filed herein on Jun 13 2002, 2002, judgment is entered in favor of Defendant FIRST INSURANCE COMPANY OF HAWAII, LTD. and against Plaintiff for costs in the amount of $ 4,079.34.

All other claims, if any, not specifically identified in this Final Judgment are dismissed.

DATED: Honolulu, Hawaii, JUN13 2002.

SABRINA S. MCKENNA /S/
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

_____

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Attorneys for Defendant
FIRST INSURANCE COMPANY OF HAWAII, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D.,

Plaintiff,

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD., JOHN DOE 1 TO 10, DOE CORPORATION 1 TO 10, DOE PARTNERSHIP 1 TO 10, and DOE ENTITY 1 TO 10,

Defendants.

CIVIL NO. 00-1-2490-08
(Other Civil Action)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED AUGUST 20, 2001

APPENDIX B

DATE: SEPTEMBER 10, 2001
TIME: 10:30 A.M.
JUDGE: SABRINA S. McKENNA

TRIAL DATE: OCTOBE8, 2001

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION FOR SUMMARY JUDGMENT FILED AUGUST 20, 2001

Defendant's Motion For Summary Judgment filed on August 20, 2001 was heard on September 10, 2001 at 10:30 a.m. and on further hearing on September 24, 2001 at 11:15 a.m. before the Honorable Sabrina S. McKenna. Stephen M. Shaw, Esq. appeared on behalf of Plaintiff and Kelvin H. Kaneshiro, Esq. appeared on behalf of Defendant First Insurance Company of Hawaii, Ltd. The Court, having reviewed the written submissions of counsel, having heard the oral arguments of counsel, and having reviewed the records and files herein, and good cause appearing, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendant's Motion For Summary Judgment filed on August 20, 2001 is granted as to the following claims for damages:

1. Expenses incurred because of inability to obtain car loan to buy a new car;

2. Interest rate difference because of lost opportunity to refinance at a lower rate;

3. Additional interest and loan fee incurred because of inability to obtain line of credit to pay debts;

4. Lost opportunity for refinancing in order to invest for profit in business projects. I am computing the costs.

5. Cost of borrowing money from family members and friends;

6. Attorney's fees to defend against unlawful garnishment; and

7. Costs to defend unlawful garnishment.

Defendant's Motion For Summary Judgment is also granted as to the Thirteen[sic] Cause of Action – Accounting.

The Court further finds that Plaintiff's libel claim is not a claim for libel per se.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Richard L. Bowen, Ph.D. is stricken as a witness and Plaintiff Emerson M.F. Jou, M.D. is stricken as an expert witness.

Defendant's Motion For Summary Judgment filed on August 20, 2001 is denied with respect to Plaintiff's claim for attorney's fees incurred in obtaining the filing of the satisfaction of judgment.

Defendant's Motion For Summary Judgment filed on August 20, 2001 is further denied with respect to Plaintiff's claim for injury to credit and reputation.

DATED: Honolulu, Hawaii, NOV 13 2001.

SABRINA S. MCKENNA /S/
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

_____

STEPHEN M. SHAW
Attorney for Plaintiff

REINWALD O'CONNOR & PLAYDON LLP
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Attorneys for Defendant
FIRST INSURANCE COMPANY OF HAWAII, LTD.

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

EMERSON M.F. JOU, M.D.,

Plaintiff,

vs.

FIRST INSURANCE COMPANY OF HAWAII, LTD., JOHN DOE 1 TO 10, DOE CORPORATION 1 TO 10, DOE PARTNERSHIP 1 TO 10, and DOE ENTITY 1 TO 10,

Defendants.

CIVIL NO. 00-1-2490-08
(Other Civil Action)

ORDER RE: MOTIONS IN LIMINE

APPENDIX C

DATE: OCTOBER 11, 2001
TIME: 1:30 P.M.
JUDGE: SABRINA S. McKENNA

OLD TRIAL DATE: OCTOBER 8, 2001

NEW TRIAL DATE: JANUARY 7, 2002

ORDER RE: MOTIONS IN LIMINE

Motions In Limine filed by Plaintiff Emerson M.F. Jou, M.D. and Defendant First Insurance Company of Hawaii, Ltd. on September 28, 2001 were heard on October 11, 2001 at 1:30 p.m. before the Honorable Sabrina S. McKenna. Stephen M. Shaw, Esq. appeared on behalf of Plaintiff and Dennis E.W. O'Connor, Esq. and Kelvin H. Kaneshiro, Esq. appeared on behalf of Defendant. The Court, having reviewed the written submissions of counsel, having heard the oral arguments of counsel, and having reviewed the records and files herein, and good cause appearing, therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiff's Motion in Limine No. 1 Re: Rule 408, Hawaii Rules of Evidence is DENIED;

2. Plaintiff's Motion in Limine No. 2 Re: Attorney Fees Recoverable for Abuse of Process of

3. Malicious Prosecution is DENIED;

4. Plaintiff's Motion in Limine No. 3 Re: Prior Bad Acts HRE 404(b) is GRANTED;

5. Plaintiff's Motion in Limine No. 4 Re: Reconsideration of Ruling on Evidence Regarding Workers Compensation is DENIED;

6. Plaintiff's Motion in Limine No. 5 to Permit Lay Technical Opinion; Memorandum in Support of Motion is DENIED;

7. Plaintiff's Motion in Limine No. 6 Re: Admissions or Concession Relating to Dr. Jou's Alleged Settlement Conduct is DENIED;

8. Plaintiff's Motion in Limine No. 7 Re: Pretrial Ruling on Punitive Damages is DENIED WITHOUT PREJUDICE. The Court will allow evidence of Defendant's net worth to be presented to the jury only after Plaintiff establishes proper evidence of actual malice on the part of Defendant;

9. Plaintiff's Motion in Limine No. 8 Re: Inference That Suppressed Witness Identification Would Lead to Favorable Proof on Liability and Damages is DENIED;

10. Plaintiff's Motion in Limine No. 9 Re: No Advice of Counsel Defense is DENIED;

11. Plaintiff's Motion in Limine No. 10 Re: FICOH's Outside Counsel are Agents, House Counsel is an Employee is DENIED;

12. Plaintiff's Motion in Limine No. 11 Re: FICOH to Produce Its Employee Witnesses for Trial was WITHDRAWN by Plaintiff;

13. Defendant's Motion in Limine No. 1 to Preclude Recently Identified Witnesses and to Strike First Amended Final Naming of Witnesses is GRANTED IN PART and DENIED IN PART. The Motion is granted as to Liz Nelander, Marivic Puaa, Eleanor Cornell, Jack Suyderhoud, Ph.D., Richard L. Bowen, Ph.D. and Joel Criz. The Motion is denied as to Leslie R. Kop, Esq. and Ed Greevy. The Motion is moot and, therefore, denied as to John A. Roney, Esq.;

14. Defendant's Motion in Limine No. 2 to Preclude Any Evidence of Financial Damages is GRANTED;

15. Defendant's Motion in Limine No. 3 to Preclude Plaintiff from Challenging the Amounts Garnished is GRANTED;

16. Defendant's Motion in Limine No. 4 to Preclude Plaintiff from Testifying as an Expert Witness is GRANTED;

17. Defendant's Motion in Limine No. 5 to Preclude Plaintiff from Calling Robert Catron as a Witness is GRANTED;

18. Defendant's Motion in Limine No. 6 to Preclude Evidence from Plaintiff as to Debt Owed to Family and Friends is GRANTED;

19. Defendant's Motion in Limine No. 7 to Preclude Evidence from Plaintiff as to Attorney's Fees Incurred is GRANTED;

20. Defendant's Motion in Limine No. 8 to Preclude Plaintiff from Calling Certain Witnesses is GRANTED IN PART and DENIED IN PART. The Motion is granted as to Allen Uyeda and Richard K. Lee. The Motion is denied as to Dean E. Ochiai, Esq. The Motion is denied without prejudice as to Ben Bondroff. If Plaintiff properly establishes a claim for punitive damages, Mr. Bondroff may be called as a witness to testify regarding Defendant's financial condition;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff's motion to continue the trial date is denied and that further discovery will be limited only to

1. depositions of certain new witnesses revealed by certain privileged documents which the Court ordered Defendant to turn over to Plaintiff on September 5, 2001; to wit, Leroy T. Kuwasaki, Esq., Leslie R. Kop, Esq., Dean E. Ochiai, Esq. and Ed Greevy, limited to

2. relevant new matters or issues not previously discoverable arising from the those certain privileged documents which the Court ordered Defendant to turn over to Plaintiff on September 5, 2001; and

3. a deposition of a 30(b)(6) representative for Defendant limited to new matters or issues raised by the above-described documents or depositions.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parties submit this matter for mediation as soon as possible.

DATED: Honolulu, Hawaii, OCT 29 2001.

SABRINA S. MCKENNA /S/
JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

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STEPHEN M. SHAW
Attorney for Plaintiff